

FEB 23 2012

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,

) CASE NO. 7:00CR00022

) CASE NO. 7:99CR00048

)

vs.

) MEMORANDUM OPINION

)

)

REGINALD MIMMS,

) By: James C. Turk

Defendant.)

) Senior United States District Judge

Reginald Mimms, a federal inmate proceeding *pro se*, renews the petition for a writ of *audita querela*, pursuant to 28 U.S.C. § 1651(a) that he filed earlier this month, in which he asserts that in light of recent court decisions, his convictions must be vacated because the government relied on evidence seized in violation of his Fourth Amendment rights. By opinion and order entered February 7, 2012, the court found that the writ of *audita querela* was not available to Mimms, *see In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000); construed Mimms' submission as motion to vacate, set aside or correct the sentence, pursuant to 28 U.S.C. § 2255, *see Calteron v. Thompson*, 523 U.S. 538, 554 (1998) (stating subject matter of *pro se* motion determine its status, not its caption); and dismissed it without prejudice as successive under § 2255(h).¹

Mimms now reaffirms his intent to pursue his petition under the doctrine of *audita querela*, pursuant to 28 U.S.C. § 1651(a), and that he does not want the court to construe it as a § 2255 motion. For the reasons stated in the February 7, 2012 opinion, however, the remedy Mimms asserts is not available to him; therefore, as an *audita querela* petition, Mimms motion will be dismissed. Furthermore, because his petition challenges the validity of his conviction

¹ Pursuant to Rule 4 of the Rules Governing § 2255 Proceedings, the court may summarily dismiss a § 2255 motion where "it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case" that petitioner is not entitled to relief.

and/or sentence as imposed, it is properly construed as another § 2255 motion. Because Mimms previously filed a § 2255 motion, *Mimms v. United States*, 7:06CV00013 (W.D. Va. 2006), appeal dismissed, 198 F. App'x 328 (4th Cir. 2006), the current submission is successive and will be dismissed as such. An appropriate order will issue this day.

The Clerk is directed to send copies of this memorandum opinion and accompanying order to the defendant.

ENTER: This 23rd day of February, 2012.



Senior United States District Judge